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The Relation of "Wyoming v. Colorado" to Colorado River Development*

By REUEL LESLIE OLSON
Professor of Law, University of Southern California and Author of
THE COLORADO RIVER COMPACT

(Statement by Dean Roscoe Pound, Harvard Law School: "Mr. Olson, to my personal knowledge, has devoted many years of study to the Colorado River Compact, and has investigated every detail with tireless persistence. I am confident that he will be found accurate in all his statements, and that his zeal and energy will have discovered everything of moment that bears upon the subject. Of the great importance of that subject one need say nothing. Its relation to the development of a means of meeting general problems without sacrificing local autonomy—one of the great problems of the day—is obvious.
(Signed) ROSCOE POUND.")

The legislature of California on October 22nd refused to give its ratification to the Colorado River Compact as a six-state agreement. This interstate compact was drafted by the Colorado River Commission at Santa Fe in 1922. It was at first hoped that it would be ratified by the seven states of the Southwest particularly interested in the development of the Colorado.

But ratification by the seven states is not yet an accomplished fact, and it is quite doubtful if such ratification will ever be secured. Arizona has consistently refused to ratify. California, though at one time taking its place among the states supporting the compact, subsequently conditioned its ratification upon the construction of storage reservoirs in the lower basin. Its most recent action, expressed in special legislative session, affirms that position.

The result is that a deadlock has been reached, for the states of the upper basin assert that there shall be no construction of any kind until their rights are protected by a compact. The conflicting points of view of the states involve numerous questions of law. Present indications are that these legal issues in Colorado River development must be resolved before actual construction can take place.

Among these issues, what is known by students of the Colorado River question as the Hamele-Bannister controversy will undoubtedly be passed upon by the courts. One phase of that controversy will be discussed in the latter portion of the present article. Another point which will be of primary importance in case litigation develops, is the question of the effect of a provision in the enabling act granting statehood to Arizona. This act contains a reservation to the federal government of certain rights in the Colorado River.

But although the exact issues in any proposed litigation have not been definitely defined, it is certain that further discussions of any one of the numerous phases of the legal problems of Colorado River development will involve the case of Wyoming v. Colorado.[1] In the following paragraphs this case will be considered with particular reference to the problem of Colorado River development. The method of treatment will include an analysis of the decision which will constitute the major portion of the present article. A discussion of the inadequacies of that case when applied to the development of the Colorado will appear as a continuation of this subject in a subsequent number of the Bulletin.

During the interim between the sessions of the Colorado River Commission, the Supreme Court entered its decision in the Wyoming-Colorado case.[2] Mr. Hoover, Chairman of the Colorado River Commission, declared that, "That decision, perhaps, simplifies the issues, because it fairly definitely establishes interstate rights to the water by priority of

[1]259 U. S. 419, 66 L. Ed. 660, 42 Sup. Ct. 552 (1922).

[2]This case was argued three times. The bill was brought in 1911, the evidence was taken in 1913 and 1914, and the parties put it in condensed and narrative form in 1916. The decree was entered July 15, 1922 (259 U. S. 496), but a modified final decree of Oct. 9 , 1922 (260 U. S. 1), indicates that four different appropriations which affected Colorado and one of which also affected Wyoming, were not provided for by the first decree.

*EDITOR'S NOTE: This article and the one to follow in the next number of the *Bulletin* are based largely upon Chapter V. of Dr. Olson's book, *The Colorado River Compact*, published and distributed by the author September 1, 1926.

beneficial use."[3] It is certain that much was hoped for in the Wyoming v. Colorado decision. Thus, at one of the hearings of the Commission, Mr. Corthell, of counsel in the litigation, expressed the hope "that the Supreme Court would announce a decision in the Colorado-Wyoming case." "It is possible," he stated, "that it will not furnish a universal principle or rule, but undoubtedly if it does decide the case, it will announce a decision which will have an effect on this Commission or ought to have.[4] Mr. Carpenter, Commissioner from Colorado, pointed out that "the only advantage of any rule to be announced by the Supreme Court would be a rule to be applied by the courts when the states are not able to settle their differences by treaty.[5]

But in spite of the fact that the law was not well settled prior to the decision of Wyoming v. Colorado, there are still many questions left undecided, as will be evident before we have gone much further in the present discussion. However, it will be worth while to note a number of principles which were recognized by the Supreme Court in that case, the question for consideration being the rights of appropriators in different states to the waters of an interstate stream, the Laramie River.[6]

The State of Wyoming brought suit against the State of Colorado and two Colorado corporations to prevent a proposed diversion in Colorado of part of the waters of the Laramie River, an interstate stream. As the United States appeared to have a possible interest in some of the questions, the court directed that the suit be called to the attention of the Attorney General; and, by the court's leave, a representative of the United States participated in the subsequent hearings. The Laramie is an innavigable river which has its source in the mountains of northern Colorado, flows northerly 27 miles in that State, crosses into Wyoming, and there flows northerly and northeasterly 150 miles to the North Platte River, of which it is a tributary. For many years some of the waters of the Laramie River have been subjected to diversion and use, part in Colorado and part in Wyoming. When the suit was brought, the two corporate defendants, acting under the authority and permission of Colorado, were proceeding to divert in that State a considerable portion of the waters of the river and to conduct the same into another watershed, lying wholly in Colorado, for use in irrigating lands more than fifty miles distant from the point of diversion. The topography and natural drainage were declared to be such that none of the water could return to the stream or ever reach Wyoming.

By the bill Wyoming sought to prevent this diversion on two grounds: One, that without her sanction the waters of this interstate stream could not rightfully be taken from its watershed and carried into another where she never could receive any benefit from them; and the other, that through many appropriations made at great cost, which were prior in time and superior in right to the proposed Colorado diversion, Wyoming and her citizens had become and were entitled to the use of a large portion of the waters of the river in the irrigation of lands in that State and that the proposed Colorado diversion would not leave in the stream sufficient water to satisfy these prior and superior oppropriations, and so would work irreparable prejudice to Wyoming and her citizens.

By the answers Colorado and her co-defendants sought to justify and sustain the proposed diversion on three distinct grounds: First, that it was the right of Colorado as a State to dispose, as she might choose, of any part or all of the waters flowing in the portion of the river within her borders, "regardless of the prejudice that it may work" to Wyoming and her citizens; secondly, that Colorado was entitled to an equitable diversion of the waters of the river and that the proposed diversion, together with all subsisting appropriations in Colorado, did not exceed her share; and, thirdly, that after the proposed diversion there would be left in the river and its tributaries in Wyoming sufficient water to satisfy all appropriations in that State whose origin was prior in time to the effective inception of the right under which the proposed Colorado diversion was about to be made.

The answer of the court to Colorado's con-

[3]Committee on Irrigation of Arid Lands, House of Representatives, Sixty-seventh Congress, Second Session, *Hearings on H. R. 11449, by Mr. Swing, A Bill to Provide for the Protection and Development of the Lower Colorado River Basin*, Part I, p. 52.

[4]Colorado River Commission, *Hearing*, Senate Chamber, State Capitol Building, Cheyenne, Wyoming, April 2, 1922, p. 29.

[5]Colorado River Commission, *Hearing*, Senate Chamber, State Capitol Building, Cheyenne, Wyoming, April 2, 1922, p. 30.

[6]Much of the language in several of the paragraphs which follow has been taken from the opinion in the Wyoming-Colorado case.

tention that she as a state rightfully might divert and use, as she might choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this might work to others having rights in the stream below her boundary, did not sustain Colorado's point of view. "The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other," declared Mr. Justice Van Devanter, writing the opinion of the court. He also pointed out that a like contention was set up by Colorado in her answer in Kansas v. Colorado, but was adjudged untenable, further considerations satisfying the members of the Supreme Court that the ruling was right.[7]

It appears from the language of the decision that Colorado objected to the doctrine of appropriations as a basis of decision. It was argued by counsel for Colorado that Colorado could accomplish more with the water than Wyoming did or could, that Colorado proposed to use it on lands in the Cache la Poudre Valley, and that they with less water would produce more than the lands in the portion of the Laramie Valley known as the Laramie Plains. The court considered the material facts and came to the conclusion that the doctrine of appropriation as a basis of decision furnishes the only basis which is consonant with the principles of right and equity applicable to this kind of controversy.

The doctrine of prior appropriation, therefore, as the basis of water rights, is the rule to be applied even though one area be less productive than another. Prior appropriation of the water for use on relatively poor land takes precedence over subsequent appropriation for use on good land. To what extent this principle may be carried it is difficult to say. In the discussion of this point in the Wyoming-Colorado opinion it should be noted that the court found that the combined farming and stock raising which was done in Wyoming constituted "a recognized and profitable industry" which had been carried on there for many years and was of "general economic value." Whether the principle would be followed with respect to one or two prior appropriators on poor land in a relatively desolate area was not determined by the Wyoming-Colorado case.

In a general survey of a number of matters in the light of which the opposing contentions in Wyoming v. Colorado should be taken up, the Supreme Court investigated the reasons for considering the doctrine of prior appropriation as a satisfactory basis by which to determine conflicting claims to the use of water in interstate streams. "Both Colorado and Wyoming," wrote Mr. Justice Van Devanter, "are along the apex of the Continental Divide, and include high mountain ranges where heavy snows fall in winter and melt in late spring and early sumer, this being the chief source of water supply. Small streams in the mountains gather the water from the melting snow and conduct it to larger streams below, which ultimately pass into surrounding states. The flow in all streams varies greatly in the course of the year, being highest in May, June, and July, and relatively very low in other months. There is also a pronounced variation from year to year . . . Both States have vast plains and many vallews of varying elevation where there is not sufficient natural precipitation to moisten the soil and make it productive, but where, when additional water is applied artificially, the soil becomes fruitful—the reward being generous in some areas and moderate in others, just as husbandry is variously rewarded in States where there is greater humidity, such as Massachusetts, Virginia, Ohio, and Tennessee. Both States were Territories long before they were admitted into the Union as States and while the Territorial condition continued were under the full dominion of the United States. At first the United States owned all the lands in both and it still owns and is offering for disposal millions of acres in each.

"Turning to the decisions of the courts of last resort in the two States, we learn that the same doctrine respecting the diversion and use of the waters of natural streams has prevailed in both from the beginning and that each State attributes much of her development and prosperity to the practical operation of this doctrine. The relevant views of the origin and nature of the doctrine as shown in these decisions may be summarized as follows: The common law rule respecting riparian rights in flowing water never obtained in either State. It always was deemed inapplicable to their situation and climatic conditions. The earliest settlers gave effect to a different rule whereby the waters of the streams were regarded as open to appropria-

[7]Other cases cited in support of the ruling are: Rickey Land & Cattle Co. v. Miller and Lux, 218 U. S., 258; Bean v. Morris, 221 U. S., 485; Missouri v. Illinois, 180 U. S., 208 and 200 U. S. 496; and Georgia v. Tennessee Copper Co., 206 U. S., 230.

tion for irrigation, mining, and other beneficial purposes. The diversion from the stream and the application of the water to a beneficial purpose constituted an appropriation, and the appropriator was treated as acquiring a continuing right to divert and use the water to the extent of his appropriation, but not beyond what was reasonably required and actually used. This was deemed a property right and dealt with and respected accordingly. As between different appropriations from the same stream, the one first in time was deemed superior in right, and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried to completion with reasonable diligence. This doctrine of appropriation, prompted by necessity and formulated by custom, received early legislative recognition in both Territories and was enforced in their courts. When the states were admitted into the Union it received further sanction in their constitutions and statutes and their courts have been uniformly enforcing it."[8]

In order, therefore, that water rights might be secure and thus lend stability to all home building and agricultural development in that section of the country, the Supreme Court concluded that appropriation afforded the best basis for the determination of conflicting claims. As stated in the opinion, "The first settlers located along the streams where water could be diverted and applied at small cost. Others with more means followed and reclaimed lands farther away. Then companies with large capital constructed extensive canals and occasional tunnels whereby water was carried to lands remote from the stream and supplied, for hire, to settlers who were not prepared to engage in such large undertakings. Ultimately, the demand for water being in excess of the dependable flow of the streams during the irrigation season, reservoirs were constructed wherein water was impounded when not needed and released when needed, thereby measurably equalizing the natural flow. Such was the course of irrigation development in both states. It began in territorial days, continued without change after statehood, and was the basis for the large respect always shown for water rights. These constituted the foundation of all rural home building and agricultural development, and, if they were rejected now, the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught and values mounting into large figures would be lost."

At one point in the Wyoming-Colorado opinion, the principles established by the case

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[8]Mr. Justice Van Devanter here cites the following cases showing the manner in which Colorado and Wyoming deal with such problems arising within their own jurisdictions: Yunker v. Nichols, 1 Colo., 551; Schilling v. Rominger, 4 Colo., 100; Coffin v. Left Hand Ditch Co., 6 Colo., 443; Thomas v. Guiraud, 6 Colo., 530; Strickler v. Colorado Springs, 16 Colo., 61; Oppenlander v. Left Hand Ditch Co., 18 Colo., 142; Wyatt v. Larimer and Weld Irrigation Co., 18 Colo., 298; Crippen v. White, 28 Colo., 298; Moyer v. Preston, 6 Wyo., 308; Farm Investment Co. v. Carpenter, 9 Wyo., 110; Willey v. Decker, 11 Wyo., 496; Johnston v. Little Horse Creek Irrigating Co., 13 Wyo., 208.

The following statement of Mr. Bannister to Hon. Addison T. Smith, Chairman of the Committee on Irrigation and Reclamation, House of Representatives, Washington, D. C., Feb. 21, 1924, includes additional data:

"Dear Mr. Smith: Having forgotten to comply this morning with one of the requests of Judge Raker, one of the members of your committee, I desire to make a supplemental statement. He asked that I supply the committee with cases holding that the riparian system does not exist in the seven States which I mentioned, namely, Arizona, New Mexico, Utah, Nevada, Wyoming, Idaho, and Colorado.

"The cases having bearing upon this question may be classified into those of the State courts and those of the United States Supreme Court.

"As for the State cases, I refer you to the following, although many others could be cited: Arizona: Clough v. Wing, 2 Ariz., 371. Colorado: Yunker v. Nichols, 1 Colo., 551; Coffin v. Left Hand Ditch Co., 6 Colo., 443. Idaho: Drake v. Earhart, 2 Idaho, 750. Nevada: Jones v. Adams, 19 Nev., 78. Wyoming: Farm Investment Co. v. Carpenter, 9 Wyo., 110. New Mexico: Trombley v. Luterman, 6 New Mexico, 15. Utah: Stowell v. Johnson, 7 Utah, 215. As for Federal cases, it may be said that they are in confusion as to whether or not prior to the statehood of these States the Federal Government had riparian rights and as to whether since statehood the Government has any such rights, and as to the related question as to whether in point of political or legislative power a State may select its own water system, whether appropriation or riparian. There are no Federal cases as directly to the point on either side of these questions as could be wished.

"Taking the Federal cases, however, as they are, the following support the view that it is within the power of a State to choose the appropriation system to the exclusion of the riparian system if it desires to do so, and therefore to exclude riparian rights no matter by whom owned: Krall v. United States, 79 Fed. 241 (1897). Kansas v. Colorado, 206 U. S. 46 (1906). Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 564 (1909). On the other hand, some Federal cases somewhat indicating the opposing view are: Sturr v. Beck, 133 U. S. 541 (1889). Winters v. United States, 207 U. S. 564 (1918)."

Continuous Waiver of the Statute of Limitations

By LEON R. YANKWICH *of the Los Angeles Bar*
Professor of Law, Loyola College, and Author of CALIFORNIA PLEADING AND PROCEDURE

Two recent cases have helped clarify the question whether our law recognizes a continuous waiver of the statute of limitations.

There had been intimation in prior cases that if an agreement to waive the statute should be entered into, "the courts would place some limit of time beyond which the statute would not be suspended." (Wells Fargo v. Enright, 127 Cal. 669.)

But the two cases referred to, Brownrigg v. de Frees, 70 Cal. Dec. 145, and McKee v. Jones, 51 Cal. App. Dec. 120, have removed the doubt.

Mollie A. de Frees, a mute, brought an action in the Superior Court of Alameda County against Carrie de Frees, executor of the estate of John M. de Frees. The pleading and the evidence disclosed the following facts:

Plaintiff was the issue of the marriage of John M. de Frees, deceased, and his former wife, Susan M. de Frees. In 1888, the wife brought an action for divorce against her husband. Mollie was then a minor of about the age of fifteen years. The ground of the divorce action was cruelty, and a decree was awarded the wife for that cause. She was also awarded the custody of said deaf and dumb minor child. As a consideration of the wife's forbearance in the matter of alimony and her consenting to the fixing of the amount that should be paid by the husband for the care and maintenance of said minor by contract, rather than by the court's decree, a contract or agreement of maintenance as to the minor was executed by John M. de Frees, which (title omitted) read:

"Whereas, a decree of divorce was this day granted in favor of plaintiff in the above entitled action; that in said decree no alimony is allowed and no provision is made for the care and maintenance of Mollie A. de Frees, minor daughter of plaintiff and defendant.

"Now, therefore, I, John M. de Frees, hereby promise and agree to pay to my said daughter $10.00 per month, on the 1st day of each and every month, commencing on the 1st day of September, 1888, until said Mollie A. de Frees arrives at the age of 21 years, on, to-wit: the 27th day of January, 1894. Said payments are to be made to her mother, Susan S. de Frees.

"I further promise and agree not to plead the Statute of Limitations to any payment that may become due under this contract, and I hereby, on behalf of myself, my heirs, executors and administrators, waive the Statute of Limitations as to any and all claims that may accrue against me under this contract for the period of 99 years.

"Dated: August 9th, 1888.

John M. de Frees.
Witness: Welles Whitmore."

The contract was received as a part of the evidence in the case. None of the payments provided therein was ever made except one, in the sum of $10, which was paid September 1, 1888. John M. de Frees remarried and became the father of several children by a subsequent marriage to the administratrix, and died September 1, 1918. A claim was duly presented by plaintiff to the administratrix of the estate of John M. de Frees, deceased, which included the full amount claimed to be due under the contract with interest to the date of his death. The claim was rejected by the administratrix and an action was brought to recover the principal with interest thereon, amounting to the sum of $2,036.80.

A demurrer to the complaint on the ground that the action was barred by subdivision 1 of section 337 of The Code of Civil Procedure, was overruled.

The answer did not plead the statute of limitations or laches. As a special defense, the answer alleged the execution by the deceased and acceptance by plaintiff of a deed to certain property in satisfaction of her claim under the agreement for her support.

Judgment was for the defendant.

The trial court, while finding that the agreement for plaintiff's support was made and executed as alleged in the complaint and that the special defense was not true, found that the monthly payments were not unpaid or due.

The latter finding was not based on any evidence in the record as to payment, but was

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WAIVER OF STATUTE OF LIMITATIONS

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grounded on the further finding that the plaintiff had been guilty of laches.

The action being one at law, the Supreme Court quickly disposed of the finding of laches by ruling that the defense of laches, being a creature of equity, was not available to the defendant. The court added that even if it were, the other important element necessary to make the defense of laches effective—injury resulting from delay—was totally absent.

The way was thus cleared for a consideration of the validity of the continuous waiver. The Supreme Court had no difficulty in finding consideration for the father's agreement: "He owed her (the plaintiff)," wrote Mr. Justice Sewall, "a legal and moral duty and it is inconceivable that a normal parent should harbor a desire to evade, if he could, the first obligation of parental duty, especially when that duty is rendered doubly imperative by the heavy hand of affliction. The question of want of consideration for the execution of the contract is clearly out of the case."

There still remained, however, the question, whether the court would sanction an unlimited waiver. The court brushed aside the dicta in some prior cases which had intimated that courts would place a limit beyond which the statute of limitations could not be waived, and gave full effect to the provision of section 3513 of the Civil Code:

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

This conclusion was inescapable. The statute of limitations is merely a statute of repose. The debt is not extinguished, nor is payment presumed therefrom. The statute merely bars the remedy. It does not imply a right protected by statute under the rule of public policy, but a mere personal right for the benefit of the individual, which he may waive. (Yankwich on *California Pleading and Procedure*, Section 142.)

The agreement in the above case specifically provided that the waiver should continue for ninety-nine years, which the court construed to be a waiver for the duration of decedent's life.

But while in a Vermont case (State Trust Co. v. Sheldon, et al., 68 Vt. 259), quoted from with approval in the opinion, it was stated that a waiver would be considered continuous "unless by its terms it is limited to a *specified time*," the question did not call for determination in the Brownrigg case.

It arose, however, in McGee v. Jones, supra, decided September 28, 1926, by the District Court of Appeal, Second Appellate District, Division One.

There the defendant had executed in favor of the decedent, Anna K. Jones, his promissory note, which fell due on the 9th day of June, 1910. It was alleged in the second amended complaint that in consideration of the forbearance of the plaintiff's testator to sue upon said note, and a change in the rate of interest thereon and other valuable consideration, the defendant, on April 28, 1914, renewed the same in the following language: "I hereby renew the within note and agree to pay the same one year after date and waive the statute of limitations on said note. Interest from June 9, 1914, to be seven per cent per annum." It was further alleged that on April 29, 1916, upon like consideration, the defendant executed a second renewal as follows: "I hereby renew the within note and agree to pay one year from date with interest at eight per cent, and waive the statute of limitations."

The court sustained a demurrer to this complaint without leave to amend and entered judgment in favor of the defendant.

Reversing the judgment of the trial court, the District Court of Appeal held that the agreement of waiver before it, not being limited by its terms and it not appearing in the case "that there were any attendant circumstances which would justify the inference that the waiver of the statute was limited," was clearly within the rule of continuous waiver of the Vermont case approved by the Supreme Court in the Brownrigg case.

If, as Professor Max Radin pointed out in a learned address, "A Theory of Judicial Decisions," delivered some years ago before the Los Angeles Bar Association, judges are the repositories of the moral standard of the community, and their decisions give effect to this standard, it can be seen very readily that a situation being presented which makes so strong an appeal to the high moral sense as did the facts in the Brownrigg case, Mr. Justice Sewall would have made the law conform to ethics, even if the meaning of section 3513 of the Civil Code had not been clear.

And it is well that it should be so.

Status of California Widows Concerning Government's Efforts to Recover Federal Estate Taxes Previously Refunded

By RALPH W. SMITH

Formerly Chief State Inheritance Tax Attorney, and now of Parker & Smith, Attorneys at Law

It may seem a curious paradox that three United States Attorney Generals of the same political faith would, in as many years, render conflicting and irreconcilable opinions to the Secretary of the Treasury concerning the California community property law. For example, United States Attorney General H. M. Daugherty, on March 8, 1924, rendered an opinion, known as Treasury Decision No. 3569, holding that a California widow had not only a fixed and vested interest in one-half of the community estate upon the death of her husband, but that also her interest in the income from the California community property was vested, absolute and equal to that of her husband during their married life.

This decision was superseded on October 9, 1924, by an opinion rendered by the then United States Attorney General, Harlan F. Stone, embodied in Treasury Decision No. 3670. This opinion failed to grant to the wife any interest in the community income, thereby precluding her and her husband from filing separate income tax returns; but confirmed the opinion of Attorney General Daugherty as to the widow's right to a community exemption equal to one-half of the community property passing in the estate of her husband. With these two opinions on file in his office, as well as the opinion of Hon. A. Mitchell Palmer, a former United States Attorney General, concerning the same subject, our present Attorney General, John G. Sargent, under date of June 24, 1926, in an opinion designated as Treasury Decision No. 3891, approved by the Secretary of the Treasury July 10, 1926, held that in so far as the Federal revenue laws were concerned, the wife had no interest in the California community property or avails therefrom during the life of her husband or upon his death; and that in determining the federal estate tax on the husband's gross estate, the entire value of the community property should be included. This decision was prompted by reason of the recent opinion of the United States Supreme Court in the case of United States v. Reuel D. Robbins, 269 U. S. 315, wherein the Court held that, in determining the interest of a spouse in community property, the Supreme Court of the United States must

> "Follow the rule adopted by the State Court, that the wife has a mere expectancy in such property while the husband is alive."

Under the California statute, as well as by the decisions of our Supreme Court prior to 1919 (this being the legal situation which governed the determination of the Robbins Case), the wife's interest in the community property was not fixed and vested during coverture, but was an expectancy. Therefore the United States Supreme Court concluded that the husband and wife could not in California make separate income tax returns, each reporting one-half of the income from the community property.

The Secretary of the Treasury having approved the decision of Attorney General Stone which authorized the refundment of Federal estate taxes where all the community property was carried to the gross estate in the return and a tax paid thereon, the Commissioner of Internal Revenue granted claims for refund of taxes so assessed, recomputing the tax of such estates by the allowance of an exemption to the widow equal to one-half of the community property. As result of this action, many millions of dollars were returned to California taxpayers. Also, after Attorney General Stone's opinion, and until the opinion of Attorney General Sargent was rendered, the government accepted federal estate tax returns and finally audited such returns by the granting of the community exemption to California widows. The government is now forwarding to such taxpayers or

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Message of the Los Angeles C of t
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The Doctrine of Precatory Trusts

By VERNON W. HUNT *of the Los Angeles Bar*

As a natural consequence of the widespread and rapidly increasing use of trusts in the United States, and particularly in California, where trusts in various forms are more or less commonly in use in many branches of business life and in numerous varieties of private transactions, members of the Bar are beginning to realize that there is at least one species of trust; namely, precatory trusts, so-called, about which general information is scanty and difficult to obtain.

True, the use of trust provisions in wills, deeds, etc., is a matter with which every member of the Bar is familiar, but the writer has sensed a feeling of confusion in the minds of many attorneys as to the meaning, use and status of the so-called precatory trusts. The Supreme Court of this state has, upon a few occasions, been called upon to decide questions relating to such trusts, but in spite of learned opinions by the Court, the subject as a whole is a somewhat unsettled one.

Needless to say, there is but very little, if any, literature obtainable upon this question; hence an understanding of it must be gleaned almost solely from an analysis of the opinons of the courts in the several jurisdictions.

The writer will therefore endeavor, in this article, to point out the characteristics of such trusts, in the light of leading decisions by the Courts of this state and other states; and to bring to the attention of the Bar the dangers in the use of these trusts, or in the use of words which may be deemed to create such trusts.

It should be noted that our statutes nowhere refer to precatory trusts as such, nor do the statutes of any other state. These trusts are indeed an anomolous feature of the law, having arisen solely from "decision law" in cases involving the interpretation of wills, testaments, deeds, etc., wherein precatory words such as "wish," "request," "recommend," "expect," etc., have been employed by the testator, devisor, or grantor, with respect to the disposition of certain property. A common example of this use of words is as follows: "I, John Doe, give, bequeath and devise to Jane Roe, the sum of ten thousand dollars, etc. It is my recommendation that said Jane Roe donate five hundred dollars to the Children's Home of Los Angeles."

The use of precatory words has caused much annoyance to the Courts, and, owing to the appearance of widely divergent views in extreme cases, from time to time, there is considerable apparent conflict of opinion, the same words having been given different meanings by different courts. However, it is the writer's theory that these apparent divergences of opinion may be accounted for in a large measure by the use of different words in other portions of the documents; and the writer believes, and will endeavor to show, that the fundamental doctrines relating to precatory words are prevalent in most, if not all, of the decisions, and that the only difficulty is not as to what the rule is, but as to its application.

In order to understand the position occupied by precatory trusts in the law of trusts, it is well that one should have in mind the general characteristics of trusts and their requisite features. There have been many definitions of a trust, all embodying the great, outstanding features characteristic of trusts in general, but differing radically according to the point of view from which the definition was framed. As might be expected, none of the usual definitions have met with general acceptance and none of such definitions seem to include precatory trusts; but it is the opinion of the writer that such trusts must fall within the class commonly known as "implied trusts." *Perry on Trusts* (Vol. 1, page 17) defines implied trusts as trusts which arise when they are not so directly or expressly declared in terms, but which the Courts, from the whole transaction and a construction of the words used, imply or infer to have been intended to have been created. "Courts seek for the intention of the parties, however informal or obscure the language may be," says Perry in his work on Trusts; and "if a trust can be fairly implied from the language used as the intention of the parties, the intention will be executed through the medium of a trust. Implied trusts may arise out of agreements and settlements inter vivos where there is a sufficient consideration; but they more frequently arise from the construction of wills where a consideration is implied. With respect to precatory trusts, the general rule is that if a testa-

tor make an absolute gift to one person in his will, and accompany the gift with words expressing a belief, desire, request, etc., the courts will consider the intention of the testator as manifestly implied, and they will carry the intention into effect by declaring the donee or first taker to be a trustee for those whom the donor intended to benefit."

It is, of course, a well-known rule of law that no particular form of words is necessary to create a trust, and whether or not one exists is to be ascertained from the intention of the parties as manifested by the words used and the circumstances of the particular case. It is said to be sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property. (26 R. C. L. 1180.)

In Colton v. Colton, 127 U. S. 300, a case arising in the district of California, and considered a leading case in the United States on this subject, the testator left all of his property to his wife, recommending to her the care and protection of his mother and sister, and requesting her to make such gift and provision for them as in her judgment would be best. After his death, the widow having failed to make suitable provisions for the mother and sister, each filed a bill in equity against her, setting up that the provision in their favor in the will was a trust. The court, after thoroughly reviewing the circumstances surrounding the making of the will, together with the language of the will, and after reviewing the leading cases in the United States, decided as follows:

> "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection which subsisted between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed."

The court considered the sections of the Civil Code of California relating to trusts, and decided that such sections are merely declaratory of pre-existing law and are perfectly consistent with the rules of construction already noticed as being of controlling and universal application. The court further said the question of the existence of a precatory trust depends, after all, upon the intention of the testator as expressed by the words he has used, according to their natural meaning modified only by the context and the situation and circumstances of the testator when he used them.

The court expressly adopted the views of such cases as Hess v. Singler, 114 Mass. 56; Warner v. Bates, 98 Mass. 274, and in the light of such rules as above stated decided that a trust had been created. (This case is followed in the Estate of Mitchell, 160 Cal. 618, and its influence is shown in all subsequent California decisions.)

The leading English cases of Knight v. Knight (3 Heavan 148) and In Re Diggles (L. R. 39 Ch. Div. 253), announce the rule that the doctrine of precatory trusts is not to be extended; and that, in considering whether precatory words create a trust, the court will not look merely to particular expressions, but will see whether or not by the whole will the testator's intention was to create a trust, and regard will be had to any embarrassment which would arise from a trust.

In Estate of Marti, 132 Cal. 666, (the leading case in California), the testator gave his wife all of his estate and appointed her executrix, but in the next paragraph of the will he said: "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." The will did not contain any direct words of trust, but it was claimed that the precatory words used by the testator in expressing his desire created an implied trust. The court said:

> "The cardinal rule for the construction of all wills is to ascertain the intention of the testator: and this intention is to be ascertained from the words of his will, taking into view, when necessary or appropriate, the circumstances under which it was made. Precatory words may or may not create a trust, according as they are used, and whether, in any particular will, they have been used for this purpose will depend upon the construction to be given to that will. The question for detemination is, whether the devisee or legatee is the beneficiary, or merely a trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the

conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion. In order to make him a trustee, it must appear that the testator intended to impose an imperative obligation upon him, and for that purpose has used words which exclude the exercise of discretion or option in reference to the act in question. . . . 'The English rule now is, that precatory words are not to be regarded as imperative, unless it is plain from the context that the testator so intended them.' When property is given absolutely, and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence.

"What precatory words annexed to a bequest or devise will create a trust in reference to the property bequeathed or devised, has been the subject of frequent discussion in the construction of wills, and it is impossible to harmonize the several decisions upon the subject. Upon this proposition, more, perhaps, than upon any other, may it be said that the decision in any one case cannot be taken as a precedent for another, but is available only to illustrate the application of the general rules for the construction of wills.

"In the earlier cases in the United States and England very slight terms were held sufficient to create such a trust, but in the later cases a different rule has been followed.

"If the testator accompanies his bequest with a desire on his part that it shall be applied in a certain way, or for the benefit of another than the legatee, either by coupling the same as a directing clause in the sentence by which the bequest is made, or by specific reference thereto, there is a clear manifestation that it was his intention that such disposition should be made of the property given to the legatee. In such a case a duty or obligation towards the other is imposed upon the legatee as a consideration for the gift. His acceptance of the property is upon the condition that he will comply with the direction or request of the testator, and he will be held as a trustee for that purpose. But we have not been cited to any case in which it has been determined that a legacy or devise which the testator in one portion of his will has given in absolute terms, is held in trust by reason of words of request or desire contained in a subsequent and independent clause of the will.

"Here, the precatory words stand in the will in a paragraph separate from that by which the property is given to the wife, and there is nothing in the context, or in any other part of the will, which throws any light upon the intention with which the words were used. The words themselves fall far short of a command or direction, and are rather in the nature of an expression of the testator's feelings, and a suggestion or recommendation to be considered by her in making a testamentary disposition of her estate, or as a reason to influence her therein. While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. C. C. 1324.

"Prima facie, a mere bequest or an expression of hope or confidence or expectation, does not import a command.

"According to the ordinary use of the English language, the word 'desire' does not import a trust or a charge."

(For other cases see DeLaurencel vs. DeBoom, 48 Cal. 581, In Re Whitcomb, 86 Cal. 265, Kauffman vs. Gries, 141 Cal. 295; Estate of Pforr, 144 Cal. 121; Estate of Buhrmeister, 1 Cal. App. 80; Estate of Mitchell, 160 Cal. 618; Estate of Purcell, 167 Cal. 176; Estate of Tooley, 170 Cal. 164; Estate of Browne, 175 Cal. 361; Estate of Hamilton, 181 Cal. 758; Estate of Sowash, 62 Cal. App. 512.)

Trend of Judicial Opinion

The whole doctrine of precatory trusts has been criticized as being "purely artificial, as involving the solecism of reading an imperative command into words of mere recommendation accompanying an absolute devise or bequest." Again, it is well said that "the first case that construed words of recommendation into a command made a will for the testator; for every one knows the distinction between them." (1 Simons 534.) Such statements are perhaps best accounted for and justified by the views of early times to the effect that the wish of a testator, like the request of a sovereign, was equivalent to a command, and on this ground the English courts were formerly disposed to seize upon such expressions as amounting to grants of definite rights. (Snodgrass v. Brandenburg, 164 Ind. 64; 44 Am. Dec. 377.)

There is considerable variance between the extent to which the earlier decisions went in sustaining the doctrine of precatory trusts, and the extent to which it is recognized today. The earlier English authorities, as has been seen, were quite liberal in construing precatory words as creating a trust on the theory that the precatory words were a strong indication of the testator's intention as to the disposition which he willed, as a matter of fact, regardless of the courteous terms with which he expressed his will. In other words, the earlier decisions were rendered apparently upon the tacit theory that precatory words, when addressed to near relatives, were merely polite forms of couching a command.

It is said that such modes of expression were regarded by early English courts as creating trusts because of a rule of law to

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Legal Ethics of St. Alphonso De Liguori

Legal ethics, and, what is even more significant, the present-day conception as to the particular system of principles and rules which should constitute the duty of the attorney to his client and to society, are not creations of modern times. The truth of this proposition is emphatically evidenced by a consideration of the work of St. Alphonso de Liguori, whose feast was recently celebrated in Rome and Naples.

Alfonso Maria de Liguori, founder of the order of Liguorians or Redemptorists, was born at Naples in 1696. In the early part of his illustrous career, he embraced the profession of the law, which, however, at the age of twenty-eight he relinquished for the purpose of devoting himself entirely to a religious life.

It was during his legal activity that he formulated twelve commandments for lawyers, which, their source being unknown, might very readily be supposed to be extracts from a present-day bar association's code of ethics.

The twelve commandments were:

1. No lawyer should accept unjust cases, for they are pernicious to the conscience and to decorum.
2. The client must not be burdened with unfair costs.
3. A case must not be defended with illicit or unjust means.
4. Clients' cases must be treated just as if they were one's own cases.
5. The lawyer must spare no pains or time in getting up his case properly.
6. A lawyer's delays and neglect often damage clients, and when this is the case, the lawyer should make amends.
7. The lawyer should ask God for help in his defense, for God is the first protector of justice.
8. No lawyer should accept more cases than he can give time to.
9. Justice and honesty should be like the pupils of their eyes to lawyers.
10. If a lawyer loses a case through negligence, he ought to compensate his client.
11. In defending a suit, a lawyer ought to be truthful, sincere, respectful and logical.
12. The requisites of a lawyer are wisdom, learning, diligence, truth, fidelity and sense of justice.

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of Kansas v. Colorado were restated by the Court. It was pointed out that on some of the questions there presented it was intended to be and was comprehensive, and that on others it was intended to be within narrower limits, the court saying that the views expressed in the Kansas-Colorado opinion were to be confined to a case in which the facts and the local law of the two States were as there disclosed. On full consideration it was broadly determined that a controversy between two States over the diversion and use of waters of a stream passing from one to the other makes a matter for investigation and determination by the Supreme Court in the exercise of its original jurisdiction, and also that the upper state on such a stream does not have such ownership or control of the waters flowing therein as entitles her to divert and use them regardless of any injury or prejudice to the rights of the lower state in the stream. And, on consideration of the particular facts disclosed and the local law of the two states, it was determined that Colorado was not taking more than what under the circumstances would be her share under an equitable apportionment.

Mr. Justice Van Devanter in the Wyoming-Colorado case added a word of caution concerning the scope and interpretation of the ultimate conclusion in the Kansas v. Colorado decision. "It should be observed," he said, "first, that the court was there concerned, as it said, with a controversy between two states, 'one recognizing generally the common-law rule of riparian rights' and the other the doctrine of appropriation; secondly, that the diversion complained of was not to a watershed from which none of the water could find its way into the complaining state, but quite to the contrary; and, thirdly, that what the complaining state was seeking was not to prevent a proposed diversion for the benefit of lands as yet unreclaimed, but to interfere with a diversion which had been practiced for years and under which many thousands of acres of unoccupied and barren lands had been reclaimed and made productive. In these circumstances, and after observing that the diminution in the flow of the

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California Bar Association Sections and Committees for 1926-27 Named

President Thomas C. Ridgway Appoints Members of Organization's Working Bodies to Consider and Recommend Changes in Codes and Laws

(Reprinted from the San Francisco RECORDER *of November 4, 1926)*

President Thomas C. Ridgway of the California Bar Association has completed his appointments to the various sections and committees of the association for 1926-27. In addition to the constitutional working bodies there are this year two new special committees—those on Judicial Selection, created pursuant to a resolution introduced by Warren Olney, Jr., of San Francisco, of which former Chief Justice F. M. Angellotti is chairman, and Indigent Lawyers, of which James A. Anderson of Los Angeles is chairman.

Lawyers having any suggestions as to changes in the procedural or substantive law of the state are requested to present their suggestions to the chairmen of the various sections at the earliest possible moment in order that they may receive proper consideration and action.

The complete list of President Ridgway's appointees follows:

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Joseph P. Loeb.....Los Angeles

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(Composed of all the Judges of Courts of Record in the State of California)

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river had resulted in 'perceptible injury' to portions of the valley in Kansas, but in 'little, if any, detriment' to the great body of the valley, the court said: 'It would seem equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation,' and that if the depletion of the waters by Colorado should be increased, the time would come when Kansas might 'rightfully call for relief against the action of Colorado, its corporations, and citizens in appropriating the waters of the Arkansas for irrigation purposes.' What was there said about 'equality of right' refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system."

It was then pointed out that although the Wyoming-Colorado case also involved an interstate stream, as did the Kansas-Colorado case, the controversy between Wyoming and Colorado was between states in both of which the doctrine of appropriation has prevailed from the time of the first settlements and always has been applied in the same way, and has been recognized and sanctioned by the United States, the owner of the public lands. In the Wyoming-Colorado case the complaining state was not seeking to impose a policy of her choosing on the other state, but to have the common policy which each enforces within her limits applied in determining their relative rights in the interstate stream.

The Wyoming-Colorado decision is also of importance in connection with the question of transmountain diversion. The two corporate defendants, it will be remembered, acting under the authority and permission of Colorado, were proceeding to divert in Colorado a considerable portion of the waters of the river and to conduct them into another watershed, lying wholly in Colorado. The topography and natural drainage were declared to be such that none of the water could return to the stream or ever reach Wyoming. Wyoming objected to the proposed diversion on the ground that it was to another watershed from which she could receive no benefit. The Supreme Court held that this objection was untenable. The basis of this view was the fact that in neither State does the right of appropriation depend on the place of use being within the same watershed, a state of affairs which the court did not think should be disregarded in determining what was reasonable and admissible as to this stream, as between the respective parties. Cases were cited showing that diversions from one watershed to another are commonly made in both states and the practice recognized by the decisions of their courts.[9] Pursuing the matter further it was shown that the evidence indicated that diversions are made and recognized in both states which in principle are not distinguishable from the case then under consideration, that is, where water is taken in one state from a watershed leading into the other state and conducted into a different watershed leading away from that state, and from which she never can receive any benefit.

Summing up the principles affirmed in the Wyoming-Colorado case, we find that an interstate river throughout its course is but a single stream; that the doctrine of prior appropriation which experience has shown to be better adapted to the needs of the arid West than that of riparian ownership, is regarded as the proper principle for determining relative rights to the use of water as between owners of pieces of land of different quality as well as between owners of land of the same quality; that Wyoming v. Colorado is to be distinguished from Kansas v. Colorado because of the fact that in the Wyoming case the court was dealing with two states both of which gave effect to the appropriation doctrine, whereas in the Kansas case the court was dealing with one state in which the riparian doctrine prevails and another in which the prior appropriation doctrine is in effect; and, finally, that transmountain diversion is not objectionable as between individuals of different states if by the local law of both jurisdictions such diversion is permitted. We shall find that these principles, however, have caused much concern among the states interested in Colorado River development, for their application is not clear in cases which may arise in connection with the development of that stream. In short, the Wyoming-Colorado case leaves the law unsettled on a number of points of vital importance in Colorado River development. These will be considered in a later number of the Bulletin.

[9]Coffin v. Left Hand Ditch Co., 6 Colo., 443, 449; Thomas v. Guiraud, 6 Colo., 530; Hammond v. Rose, 11 Colo., 524; Oppenlander v. Left Hand Ditch Co., 18 Colo., 142, 144; Moyer v. Preston, 6 Wyo., 308, 321; Willey v. Decker, 11 Wyo., 496, 529-531.

STATUS CALIFORNIA WIDOWS CONCERNING FEDERAL TAXES

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to the distributees of the estate of such decedents, as the case may be, tax liability letters where it is claimed that the tax was erroneously refunded by reason of the government's assuming that the case of Blum v. Wardell, 276 Fed. 226, and the opinion of Attorney General Daugherty were for all time to be the established law on this subject. The government is thereby demanding a return or repayment of the tax refunded by reason of the recognition of the community exemption. Furthermore, it is believed that the government will later endeavor to make assessments of the amount of tax claimed in its tax liability letters and cause liens to attach to the property passing in the estates of such decedents. This will cause great and unwarranted hardships on California taxpayers, due to the fact that for several years, in many instances, executors and administrators, as well as distributees of estates, have presumed that their federal estate tax problems were finally adjusted. In addition, the government's claim for the most part is against California widows, who will in many instances suffer sacrifices of property in order to raise the money to meet the government's demands should it ultimately prevail in its claim for tax. Due to the unnecessary demands of the government at this time and its great pressure to recover the tax, many California widows are paying the government's tax claim without availing themselves of their day in Court. The government should be prevailed upon to withhold the assessment of additional taxes until a decision from the United States Supreme Court might be had ultimately deciding this controversy.

On Monday, October 18, 1926, Messrs. Parker and Smith filed in the United States District Court at Los Angeles, California, for the heirs and distributees of the estate of Amos L. Burbank, deceased, against John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, a case to recover estate or inheritance taxes unlawfully assessed and collected by the Federal government on the estate of said decedent.

The gist of the action is based on the failure of the government, in the exaction of its federal estate taxes, to allow to the widow in a California community estate an exemption from tax of one-half of all the community property of said estate. This is the first case brought to test the validity of the recent opinion of Attorney General Sargent.

In accordance with an understanding with the offices of the General Counsel of Internal Revenue at Washington, D. C., the case will be advanced as rapidly as possible in order that a determination by the United States Supreme Court may be had, for all time settling the vexing tax problem as to the widow's interest in a California community property estate.

Many attorneys are of the opinion that the government will be unsuccessful in its efforts to recover any of the moneys which it has heretofore refunded by reason of the recognition of a community exemption to a California widow. This opinion is based upon the contention that, at the time of the refund, the "law of the land," by the decision of Blum v. Wardell, *supra*, and the opinion of Attorney General Stone, determined and established that the widow was entitled to one-half of the community property free from federal estate tax. It was in reliance upon this, the fixed and settled "law of the land" at that time, that the refunds were authorized. Although the "law of the land" may subsequently be altered, such alteration cannot affect a lawful act theretofore fully consummated. Furthermore, if the Commissioner of Internal Revenue erred in granting refund of tax, such error was a mistake of law, and not one of fact from which the government could be relieved.

The statute of limitations has tolled, and the right of the government to claim additional federal estate tax on many of the estates in which it is now claiming tax liability has expired. Many other barriers exist to the government's right to claim tax heretofore refunded by it, independent of the grave doubt as to whether or not the United States Supreme Court, in view of the case of Burbank v. Carter, aforesaid, and particularly in view of Section 1401 of the Civil Code of California as amended in 1923, will ultimately say that although a California widow may not have an absolute and determined interest in the community during the life of her husband, her interest does become fixed and vested immediately upon the death of the husband. Section 1401 of the Civil Code of California, as amended in 1923, reads:

> "Upon the death of either husband or wife, one-half of the community property *belongs* to the surviving spouse . . ."

DOCTRINE OF PRECATORY TRUSTS

(Continued from Page 21)

that effect imported from the Roman law. (Pennock's Estate, 20 Pa. 268.) It is also said that such rule was founded on good reason, but if that reason does not now exist, then the rule which depended upon it must not be imported as part of the law which we brought from the mother country. Its origin, therefore, in the Roman law, is a proper subject of inquiry, for if it arose there not from the ordinary meaning of the words, but under the constraint of circumstances which do not exist here, the force of the Roman rule will be much impaired, if not destroyed. The best statement of the historical aspects of the rule are found in the opinion of the court in the famous case of Pennock's Estate, 20 Pa. 268, of which the following are important extracts:

"It was part of the Roman law that the heir or devisee, accepting the estate of decedent, became at once charged by law with the payment of all his debts, whether the estate was sufficient to discharge them or not. He was in form and in substance what we would call executor and sole devisee and legatee with the additional qualification that he was bound personally for the debts, if he accepted the devise and, by way of compensation, he was not bound to pay any of the legacies bequeathed by the testator; but this matter was left by the law entirely to his discretion."

"It is plain how restricted was the right of devise under such a law. When all the Testator's bequests could be defeated at the pleasure of the devisee or instituted where he had no alternative but to use words of confidence, recommendation, or entreaty, as to any legacies or special devises and such words would be much more likely to be regarded than the clearest imperative words.

"Moreover, there were great and peculiar difficulties in making a valid will at all under the Roman law, owing to the excessive strictness and complexity of the formalities required; and hence it was usual to add a codicil, in which the testator entreated, where at law, if the will should not stand, to make the desired disposition, or to hold the property for the benefit of the persons named in the codicil. Here again words of entreaty are much more appropriate than imperative words. Under the circumstances they clearly proved an *intention* to impose a duty on the general devisee as far as was possible and not merely to entrust him with a discretion. He *intended* a legacy; it was the law that *made* it discretionary in disregard even of imperative words.

"Obviously, such an institution was basically wrong and it could not exist long without giving rise to many aggravated cases of breach of such trusts. They would call upon the law to interfere with the discretion of the devisee and enforce the clear *intention* of the testator. Hence arose a change in the law and the praetors were required to enforce trusts that were created in this form. Under such circumstances the new rule was obviously a proper one; for it enforced the very duty imposed by the testator in the best form in which he was allowed to express it.

"The origin of such trusts in England was very similar. Among the Anglo-Saxons, of course, the power of devise existed in its fullest extent and it is certain that no Anglo-Saxon will has been found containing the appointment of an executor charged with trusts. Hence we might expect to find no such trusts among them, but, after the Norman conquest and under the strict principles of feuds, devises of lands were not allowed and hence the frequent resort to conveyance by way of use, in order to be able to make provision for younger children and for other purposes. Such uses or trusts were at first of no binding obligation, depended for their execution entirely upon the honor of the grantee, and it was, therefore, very natural and appropriate that words of recommendation, desire, entreaty, and confidence should be used. It was very easy for the English chancellors to bring in the Roman law to correct the evils arising out of the breaches of such confidence, and that is what was done. It was really enforcing what was intended to be a trust and changing the law to do it. It was equity stepping in once again to correct the deficiencies of common law institutions, and modifying them into accordance with the changing customs and circumstances of the people.

"No doubt the new law continued after the reason of it had ceased and the rule, thus properly introduced, has outlived the circumstances which gave it birth and which alone ought to maintain it. True, the principles of equity are part of our common law, but it is the very essence of common law that it consists of those principles and forms which grow out of the customs and habits of the people and, therefore, only so much of the English law as is adapted to our circumstances and customs is properly recognized as part of our common law. *Cessante ratione legis, cessat et ipsa lex.*

"But the rule is fading away even in England. The dislike with which it is received by the courts of that country today is illustrated by the doctrine of extreme certainty required as to the subject and object of the recommendation, and in the fact that it is now degrading into the class of implied and not express trusts, and that it is generally regarded as frustrating the will of the testator. Such words are not now regarded in England as creating a trust, unless on the whole, they ought to be construed as imperative. The rule looks upon the words as prima facie words of trust, yet any words or expressions are eagerly seized upon as indications of a contrary intent. Under the English rule, where it is apparent that the kindness or justice or discretion of the devisee is relied upon, no trust arises and if it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or request or to apply it to the use of the devisee, no trust is created. Again, no trust or contract that is uncertain is enforced by law, because the law would have to define it or, in other words, *create* it before enforcing it."

Relative to the interpretation of wills, there is no class of cases in which there has been greater fluctuation of decisions than in that

which involves the inquiry whether a trust has been imposed upon a devisee or legatee in favor of other persons. An artificial rule such as is set forth by the courts in creating precatory trusts, a rule that is founded on no great purpose or policy and that, while it is professing to seek, sets aside, the will of the testator, must continually be contested and frequently invaded. It rejects the plain common sense of expressions and it is not in human nature to submit to it without a contest.

The whole doctrine is summed up in a single proposition, by an eminent authority, as follows:

> "In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner."
>
> (Pomeroy Eq. Jur., cited in 40 Cyc. 1734.)

There is, of course, no doubt that however strong the language of recommendation or request may be, a trust will not be declared if the testator declares that such is not his intention; for example, a declaration that he "recommends but does not command." Moreover, a trust will never be declared where such a construction of the precatory words would render them repugnant to, or inconsistent with, other parts of the same instrument, or rule of law. If, by construing a recommendation or the expression of a wish into a trust, the terms of the preceding bequest would be contradicted, a trust will not be raised. (Ann. Cas. 1915 D., p. 416.)

Again, a trust will not be raised from precatory words where it would be impracticable for a court to deal with and execute it. Nor will a trust be declared if there is uncertainty as to the property to be subjected to the trust, or as to the persons to be benefitted by the trust, or as to the manner in which the property is to be applied. (40 Cyc. 1734, Ann. Cas. 1915 D, p. 416.)

No trust will be created if, taking the whole instrument and all the circumstances together, it is more probable than otherwise that the testator intended to communicate a discretion and not an obligation. (Perry on Trusts, Vol. I, pages 147 et seq., 2 Ann. Cas. 593, 21 Ann. Cas. 321.)

The later decisions have broadened the rules of interpretation considerably, as illustrated by the Colton v. Colton case, in which the court said that the intention of the testator, as ascertained from the whole will *and the situation* of the parties, is controlling. Such a rule has been adopted by the California courts, and is said to be the true modern rule for ascertaining whether a precatory trust is created by a will. (2 Ann. Cas. 593, 181 N. Y. 15, 21 Ann. Cas. 321, 160 Cal. 618.) No hard-and-fast meaning can be given to words apart from their connection and the atmosphere of the instrument in which they are used. (21 Ann. Cas. 321.)

The question must be left to each court to determine in the particular case whether or not that court deems a trust to have been created. However, this much may be said, that in view of the strict attitude assumed by the courts, as illustrated by the decision in Pennock's Estate, words in a will expressive of desire, recommendation, etc., are not today prima facie sufficient to convert a devise or bequest into a trust, but such words *may* amount to a declaration of trust when it appears from the words used and from other parts of the will and the surrounding circumstances that the testator intended them in an imperative sense and that both the subject and object of the recommendation, or wish, etc., are certain.

In conclusion, while conceding that this doctrine has never met with unanimous approval, that many of the objections to it are obviously well founded, and that in some cases the intent of the testator may be violated rather than carried out, the writer yet believes it cannot in justice be arbitrarily abrogated, because the result would be the confinement of trusts to certain fixed, invariable formulae. The writer is of the opinion that if the courts will confine the doctrine to as strict limits as possible, placing it upon reasonable rather than artificial grounds, and hesitating to create trusts unless the intention so to do can be ascertained clearly, then justice will be done.


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